IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.36 OF 2005

M/s.Shree-Gruhadatta Gruha-
Nirman Sanstha & Anr. ...Appellants

Vs.

Khanderao Baburao Burhade & Anr. ...Respondents

Mr.P.M.Pradhan h/f Mr.A.R.Pitale for the Appellant
Mr.V.D.Gautam with Mr.G.M.Gautam for Respondent No.1

CORAM: A.S.OKA, J.
DATED: JANUARY 19, 2005.

P.C.:

1. Heard Shri Pradhan for the Appellant. The Appeal is by the original Defendants and the challenge is to the Decree of specific performance passed in favour of the Respondent No.1

2. Admittedly, on 18th June 1994, the Appellants executed in favour of the Respondent No.1 an Agreement for Sale of the suit flat. Admittedly, the agreed consideration was Rs.1,40,000/- and the agreement was registered. As per the agreement the first instalment of Rs.80,000/- was to be paid on or before 30th June 1994. The case of the Appellants is that the Respondent No.1 paid only a sum of Rs.20,000/- by 30th June 1994. On 8th July 1996, the Appellant No.1 issued notice to the Respondent No.1 stating therein that he has not been paying instalments towards price as per the agreement. In the notice it was stated that if the sum of Rs.50,000/- is not paid within 15 days, legal action will be taken against the Respondent No.1 and the agreement will be cancelled and

the flat in question will be sold to another purchaser. Both the courts below have held that a sum of Rs.1,20,000/- was paid by the Respondent No.1 on the basis of the suit Agreement. It is also held that after notice dated 8th July 1996 was issued by the Appellant No.1, a sum of Rs.50,000/- was paid by the Respondent No.1 to the Appellants. A contention was raised in the Courts below that the suit flat has been sold by the Appellants to the Defendant No.3 and the Defendant No.3 is the bonafide purchaser. The said contention is also negatived by the Courts below.

3. Shri Pradhan learned Counsel for the Appellants submitted the schedule of payment was incorporated in the said agreement and the Respondent No.1 committed gross defaults in paying agreed consideration as per the schedule. He therefore submitted that the Appellants were entitled to terminate the suit agreement. He submitted that apart from notice dated 8th July 1996, another notice was given to the Respondent No.1 of termination. He submitted that as the Respondent No.1 committed gross defaults, the Appellants were entitled to terminate agreement and in any case the Respondent No.1 was not entitled to a decree for specific performance. He submitted that the finding recorded by the Courts below regarding payment of Rs.1,20,000/- by the Respondent No.1 to the Appellant is also not borne out from the record. He has taken me through the notes of evidence annexed in the Civil Application.

4. There is a concurrent finding by the Courts below that a sum of Rs.1,20,000/- was paid by the Respondent No.1 to the Appellant on the basis of the suit Agreement. In examination-in-chief of the Respondent No.1, he has given details of the payments made by him to the Appellant No.1. According to the Respondent No.1 payment of Rs.5,000/- and Rs.10,000/- is made in cash and so far as payment of Rs.10,000/- is concerned, there is a receipt issued by the Appellants. The said receipt produced on record and exhibited. All other payments have been made by the Respondent No.1 either by cheques or Demand draft and particulars thereof have been set out in the examination-in-chief. Certain receipts executed by the Appellant No.1 in favour of the Respondent No.1 have been placed on record and proved. Perusal of the cross examination shows that the entire thrust is on default committed by the Respondent No.1 in payment of instalments of price. In the examination in chief of one Vasant A.Desai who is the father of Proprietor of Appellant No.1, there is no clear statement made as to how much total amount was received by the appellant No.1 from the Respondent No.1 before 8th July 1996. In paragraph No.6 of the examination-in-chief, there is a clear admission that after notice dated 8th July 1996 was served on the Respondent No.1, he received total sum of Rs.50,000/-. It is stated that a sum of Rs.50,000/- was not received within the time stipulated in the agreement.

After having perused the notes of evidence, no fault can be found with the findings of fact recorded by both the Courts below that a sum of Rs.1,20,000/- was paid by the Respondent No.1 to the Appellant No.1. Substantial part of the said payments is made by Demand Drafts/cheques and the receipts issued for various payments are produced on record and exhibited. There is no perversity in the findings recorded by the Court below.

5. It becomes admitted position from the record that by notice dated 8th July 1996 the Appellant No.1 called upon the Respondent No.1 to make further payment of Rs.50,000/-. It is not in dispute that the sum of Rs.50,000/- has been paid by the Respondent No.1 to the Appellant No.1 as per the demand made in the notice.

6. Even assuming that there were defaults committed by the Respondent No.1 in payment of instalments of price, it is to be borne in mind that the Apex Court has held that in case of contract of immovable property, there is a presumption that time is not the essence of the contract. Apart from that the notice dated 8th July 1996 issued by the Appellant no.1 shows that Appellant No.1 was happy if the Respondent No.1 pays him further amount of Rs.50,000/- which was infact paid by the Respondent No.1 to the Appellant No.1. Apart from the said notice dated 8th July 1996, there is no other notice of termination on record. Considering these aspects a the

finding was recorded by both the Courts below that the Respondent No.1 was ready and willing to comply with his part of the agreement.

7. In so far as Defendant No.3 is concerned, he claims to be a bonafide purchaser without notice of the suit agreement. However, Defendant No.3 has not stepped into the witness box and has not led any evidence to show that he is a bonafide purchaser.

8. No substantial question of law arises in the Second Appeal. Second Appeal is dismissed with no order as to costs.

Judge.